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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

May 28, 1996

**EX PARTE**

Mr. William Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

**Re: CS Docket No. 96-46, Open Video Systems (OVS)**

Dear Mr. Caton:

Bell Atlantic, MFS, Lincoln Telephone and GTE are submitting this written ex parte in response to the OVS nondiscriminatory carriage requirement issues raised in several meeting with Commission personnel last week.

The parties to this letter, in individual comments had endorsed the Commission's initial proposal which would "simply prohibit an OVS operator from discriminating against unaffiliated programmers in its allocation of capacity" and "allow the OVS operator latitude to design a channel allocation policy consistent with this general rule."<sup>1</sup> In addition, the notice stated that "such an approach would provide operators with maximum business flexibility" and "this approach may be the most effective in encouraging telephone companies to begin providing service over open video systems", while preserving the Commission's broad latitude, in the complaint process, to require carriage, award damages or provide any other remedy available under the Communications Act.<sup>2</sup> We continue to believe that the marketplace, combined with the Commission's enforcement jurisdiction and the statutory capacity requirements, will assure both maximum development of market-based OVS while ensuring that OVS operators offer just, reasonable and nondiscriminatory services to unaffiliated programmers.

<sup>1</sup> See Notice at para. 12

<sup>2</sup> Id.

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Nevertheless, given the concerns raised by several parties, we have sought to develop an alternative approach that might permit the Commission to strike an acceptable balance between specific rules governing nondiscrimination in the capacity allocation process, while retaining operator flexibility and incentives to build OVS. Bell Atlantic, MFS, Lincoln Telephone and GTE believe that this delicate balance could be achieved if the Commission adopted an open enrollment process, of limited duration, that an OVS operator would be required to conduct as part of fulfilling their nondiscrimination requirement.

A rule to the following effect would be acceptable:

The certificate of compliance filed by an OVS operator must include a statement that the operator has or will conduct an open enrollment period of at least 30 days. Such a process will provide unaffiliated video programming providers adequate opportunity to seek capacity from the OVS operator. If demand does not exceed capacity during open enrollment, the operator's affiliate may subscribe to any unreserved/unused capacity. Once the initial open enrollment process has been completed, whether the system is operational or not, the operator is not required to reallocate or otherwise modify contractual agreements with programmers entered into during the initial open enrollment, for a period of up to 5 years, in the event additional demand materializes.

Our conclusion that such an open enrollment process will not necessarily impede our business flexibility is premised on the Commission adopting OVS rules that do not preclude the OVS operator from establishing any or all of the following types of requirements on parties seeking carriage.


- 1) The imposition on video programming providers of reasonable requirements for creditworthiness and financial stability.
- 2) Requirements that video programming providers provide evidence concerning their legal access to the programming such providers propose for carriage on the open video system prior to execution of the carriage agreement with the open video system operator.
- 3) Requirements that video programming providers provide evidence concerning their ability to meet certain technical standards in order to be provided carriage on the open video system.
- 4) Requirements that video programming providers provide reasonable assurances to the open video system operator that such providers will be able to provide programming on its assigned channels in a timely manner.


These four requirements were proposed by the Joint Parties in draft rules appended to their OVS comments. These proposed rules are based on the experience of companies who conducted open enrollments for video dialtone trials and commercial service offerings. Bell Atlantic, MFS, Lincoln Telephone and GTE believe that an open enrollment process should not be mandated if we are unable to impose these requirements.


Regarding the related issue of capacity allocation in the event initial demand exceeds capacity, we believe that any operator who chooses from among the options defined in the Commission final rules, should be deemed to have presumptively met its nondiscriminatory carriage obligation. In addition to the options listed in the OVS rulemaking notice -- first come, first served; lottery; or proportional allocation -- we also recommend that the rules permit auctions and Nielsen ratings to be options for allocation.


Please include this correspondence as part of the public record in the above-captioned proceeding. Please contact any of the undersigned parties if you have any questions concerning this letter.

Sincerely,

  
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